United States Court of Appeals

for the Second Circuit

APPENDIX

76-1075
F5476

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Pgs

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75 CR 676

UNITED STATES OF AMERICA,

Appellee,

vs.

RALPH MARIANI,

Appellant.

Appeal from a Judgment of Conviction in the United States District Court for the Eastern District of New York, Sat Below: Thomas Platt, U.S.D.J. and a Jury

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APPENDIX TO APPELLANT'S BRIEF

Stephen Flamhaft, Esq.
32 Court Street
Brooklyn, N.Y. 11201
Attorney for Appellant
237-1900

Form DJ-195
(Ed. 2-7-66)

No. _____

UNITED STATES DISTRICT COURT

Eastern *District of* New York

Criminal *Division*

THE UNITED STATES OF AMERICA

vs.

FELIX C. ACEVEDO, et al.

Defendant

INDICTMENT

Title 18, United States Code,
Sections 2113(a) and (d) and
Section 2

A true bill,

_____

Foreman.

Filed in open court this _____ *day*

of _____, *A. D. 19*____

_____

Clerk.

*Bail, $*_____

Cheryl M. Schwartz, AUSA

(212) 596-4621

GPO 902-482

RJD:SMC:ad
F. #753,334

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

-against-

FELIX C. ACEVEDO and
RALPH MARIANI,

Defendants.

- - - - - - - - - - - - - - - - - - X

Platt J

INDICTMENT

Cr. No. 75 CR 776
(T. 18, U.S.C., §§2113
(a) and (d) and §2)

9-12-75

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 25th day of August, 1975, within the Eastern District of New York, the defendants FELIX C. ACEVEDO and RALPH MARIANI knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chemical Bank, 1600 Cortelyou Road, Brooklyn, New York, approximately two thousand three hundred ninety-eight dollars ($2,398), in United States currency, which money was in the care, custody, control, management and possession of the said Chemical Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, §2113(a) and Title 18, United States Code, §2.)

COUNT TWO

On or about the 25th day of August, 1975, within the Eastern District of New York, the defendants FELIX C. ACEVEDO and RALPH MARIANI knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chemical Bank, 1600 Cortelyou

hundred ninety-eight dollars ($2,398), in United States currency, which money was in the care, custody, control, management and possession of the said Chemical Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendants FELIX C. ACEVEDO and RALPH MARIANI did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon (Title 18, United States Code, §2113(d) and Title 18, United States Code, §2.)

A TRUE BILL

FOREMAN

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

D. C. Form No. 100
CRIMINAL DOCKET

75 CR 676

PLATT, J.
75-757

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: SCHWARTZ
vs.	
FELIX C. ACEVEDO and	
RALPH MARIANI	
CLOSED	
	For Defendant:

Bank robbery and use of dangerous weapon

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED					
			DAT	NAME	RECEIVED		DISBURSED	
Fine,								
Clerk,								
Marshal,								
Attorney,								
Commissioner's Court,								
Witnesses,								

DATE	PROCEEDINGS
9-12-75	Before RAYFIEL, J - Indictment filed
9/26/75	Before PLATT,J.- Case called- Each deft arraigned and each enters a plea of not guilty-10 days for all motions-Adjd to 10/10/75 for all purposes
9-26-75	Govts Notice of Readiness for Trial filed
10-6-75	Notice of Motion filed, ret. Oct. 10. 1975 for dismissing the indictment as to deft Mariani, severance , suppression, etc.
10/10/75	Before PLATT,J.- Case called- Defts and counsel present - deft Mariani's motion withdrawn- adjd to 10/20/75 at 9:30 A.M.for trial
12-12-75	Before PLATT, J - case called - defts & attys present -On motion of AUSA Schwartz the indictment is dismissed as to both defts.
12-12-75	By PLATT, J - Order of dismissal filed as to each deft.

(Jury present)

THE COURT: Now, ladies and gentlemen, I am going to give you some instructions on the law applicable to this case. I have followed the practice of reading the instructions. I am fully aware of the fact that this makes it more difficult for you to follow, but, on the other hand, it minimizes the risk of error and if error is commited in instructions to the jury, ofttimes it means that the case has to be retried and that is something that we try to avoid, rather than to encourage, in view of the volume of the work of this Court.

So that I beg your indulgence and ask you to listen carefully to the instructions and if my voice drops or any of you cannot hear me, to let me know.

Now that you have heard the evidence and the argument, it becomes my duty to give the instructions of the Court as to the law applicable to this case. Your duty as jurors is to follow the law as stated in the instructions of the Court and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions

as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by the Court.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

You must not permit yourselves to be governed by sympathy, bias, prejudice or any other considerations not founded on evidence and these instructions on the law. Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors and to arrive at a verdict by applying the same rules of law as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the not guilty pleas of the accused.

You are to perform this duty without bias or prejudice as to any party. Again, the law does not

permit jurors to be governed by sympathy, prejudice or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict regardless of the consequences.

I am not going to send the exhibits which have been received in evidence with you as you retire for your deliberations. You are entitled, however, to see any or all of the exhibits as you consider your verdict. I suggest that you begin your deliberations and then if it would be helpful to you, you may ask for any or all of the exhibits simply by sending a note to me through one of the Deputy Marshals who will be stationed outside your jury room door.

An indictment is but a form or method of accusing a defendant of a crime. It is not evidence of any kind against the accused. There are two types of evidence from which a jury may properly find a defendant guilty of a crime.

One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, that is, the proof of facts and circumstances which rationally imply the existence or non-existence

of other facts because such other facts usually follow according to the common experience of mankind.

For example, the footprint of a man in the sand implied to Robinson Crusoe that there was another man with him on the desert island, and indeed there was, the Man Friday.

Thus, on the one hand you may have direct evidence of the issue and on the other hand you may have circumstantial evidence of the issue. The law does not hold that one type of evidence is necessarily a better quality than the other.

The law requires only that the Government prove its case beyond a reasonable doubt both on the direct and circumstantial evidence. At times a jury might feel that circumstantial evidence is a better quality, at other times it may feel direct evidence is a better quality. That judgment is left firmly up to you.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Now, the law presumes the defendants to be innocent of crime. Thus, a defendant, although accused,

begins the trial with a clean slate, with no evidence against him. The law permits nothing but legal evidence to be presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

A reasonable doubt does not mean a doubt arbitrarily and capriciously asserted by a juror because of his or her reluctance to perform an unpleasant task. It does not mean a doubt arising from the natural sympathy which we all have for others.

It is not necessary for the Government to prove the guilt of the defendants beyond all possible doubt. Because if that were the rule, very few people would ever be convicted. It is practically impossible for a person to be absolutely sure and convinced of any

controverted fact which by its nature is not susceptible of mathematical certainty.

In consequence, the law says that a doubt should be a reasonable doubt, not a possible doubt. A reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important affairs of your own life.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. Again, a reasonable doubt means a doubt that is based on reason and must be substantial rather than speculative. It must be sufficient to cause a prudent person to hesitate to act in the most important affairs of his or her life.

The requirement of proof beyond a reasonable doubt operates on the whole case and not on the separate bits of evidence. Each individual item of evidence need not be proved beyond a reasonable doubt.

The statute alleged to have been violated in Count 1 of the indictment reads in pertinent part as

follows: This is the statute that pertains to Count 1. "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of any bank shall be in violation of the law." That is 2113A of Title 18, United States Code. Pertinent part.

That count also alleges a violation of Section 2 of Title 18, which, as I indicated to you at the outset of the trial is the so-called aiding and abetting section. That section reads, "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

"Whoever willfully causes an act to be done, which if directly performed by him or another, would be an offense against the United States, is punishable as a principal."

Now, you will recall it is charged in Count 1 of the indictment that on or about the 25th day of August, 1975, within the Eastern District of New York, the defendants Felix C. Acevedo and Ralph Mariani knowingly and willfully, by force, violence and

intimidation, did take from the person and presence of employees of the Chemical Bank, 1600 Cortelyou Road, Brooklyn, New York, approximately $2,398 in United States currency, which money was in the care, custody, control, management and possession of the said Chemical Bank, the deposits of which bank were then and there insured by the FDIC.

The essential elements of the crime charged in Count 1 of the indictment which must be proven beyond a reasonable doubt are: One, the act or acts of taking from the person or presence of another money belonging to or in the care, custody, control, management or possession of the bank as charged. Two, the act or acts of taking by force, violence or by intimidation. Three, doing such an act or acts knowingly and willfully. Four, the bank was a bank, the deposits of which were insured by the FDIC. It has been stipulated and agreed that the Chemical Bank was a bank, the deposits of which were insured by the FDIC at the time of the offense alleged in the indictment.

So, you can take that as a fact which has been proven. As far as the words, "to take by intimidation," are concerned, to take or attempt to take by intimidation means willfully to take or attempt to take by

putting in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim. However, the fear of the victim need not be so great as to result in terror, panic or hysteria.

A taking or an attempt to take by intimidation must be established by proof of one or more acts or statements of the accused which were done or made in such a manner and under such circumstance as would produce in the ordinary person fear of bodily harm.

However, actual fear need not be proved. Fear like intent may be inferred from statements made and acts done or omitted by the accused and by the victim as well and from all the surrounding circumstances shown by the evidence in the case.

A few more words on this question may be useful. With respect to this element, the Government is not required to show that force and violence were actually used against anyone, if it proves beyond a reasonable doubt that the taking was the result of intimidation. That is, the result of placing another person or persons in fear.

Intimidation may be established by proof of circumstances that are normally and reasonably

calculated to arouse fear in the ordinary run of human; so if it happened that some extraordinarily timid person was put in fear, by some sort of words or action, it would not normally frighten anyone, this would not be the kind of an intimidation with which the statute is concerned.

On the other hand, if the proof shows conduct by a defendant which would normally be expected to generate fear, then it is not necessary that those affected should actually have experienced some terror or panic or hysteria.

The question in short in this respect is an objective one. It is whether the Government has sustained its burden of showing conduct of the accused which was of such a nature as to be a sensible and respectable basis for the creation of fear.

Now, alternatively, to take by force and violence means that there is physical force used and that it was not a peaceful taking, such as an embezzlement.

Now, the statute alleged to have been violated in Count 2 of the indictment reads in pertinent part as follows: Whoever, in commiting or attempting to commit any offense defined in Subsection A, that is the subsection which I read to you in connection with

Count 1 of this section, assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be in violation of the law.

Again, in this count of the indictment, the aiding and abetting section is also called into play and it reads again: Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. Whoever willfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States is punishable as a principal.

Notice, it is charged in Count 2 of the indictment that on or about the 25th day of August, 1975, within the Eastern District of New York, the defendants Felix C. Acevedo and Ralph Mariani knowingly and willfully by force, violence and intimidation, did take from the person and presence of employees of the Chemical Bank, 1600 Cortelyou Road, Brooklyn, New York, approximately $2,398 in United States currency, which money was in the care, custody, control, management and possession of the said Chemical Bank, the deposits of which bank were then and there insured by the FDIC,

and in commission of this act and offense, the defendants Felix C. Acevedo and Ralph Mariani did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon.

The following are the essential elements of the crime which are required to be proven beyond a reasonable doubt, in order to establish the offense charged in Count 2 of the indictment. One, the act or acts of taking from the persons or presence of another money belonging to or in the care, custody, management and possession of the bank as charged. Two, the act or acts of taking by force, violence or by intimidation. Three, the act or acts of assaulting or putting in jeopardy the life of any person by the use of a dangerous weapon or device while engaged in taking such money from the bank as charged. Four, doing such act or acts knowingly and willfully. Five, the bank was one, the deposits of which were insured by the FDIC. And again, element number five has been stipulated and agreed to by the attorneys for the parties here.

Now, as I have indicated, this count requires a finding either, one, that there was an assault or, two, that the lives of one or more persons were

placed in jeopardy by the use of a dangerous weapon or weapons. It is not essential to find both an assault and an endangering of lives by the use of such weapons.

In considering this, you will have in mind and undertake to remember and apply the legal definition of the word "assault". That word is defined to refer to an unlawful attempt or threat to apply force and violence, to inflict bodily injury when the intent or threat is coupled with an apparent present ability to carry it out. Such as to arouse fear in the intended threatened victim that he would be subject to immediate bodily injury.

An assault as it is defined in law may be committed without actually touching or striking or doing bodily harm to the person in question. For example, to speak in terms of the problem you have, the flourishing or pointing of a pistol or gun at another person, for the purpose of putting that other person in fear, if you so find such to have occurred, is sufficient to constitute an assault.

I also mentioned to you just now that even if you find no assault in connection with Count 2, this count may be established if you find that the life of one or more people were put in jeopardy by the use of

a dangerous weapon.

To justify such a finding in this case, you must be convinced beyond a reasonable doubt that the accused carried one or more firearms which was drawn and loaded. It is not essential to such a finding that there be direct evidence that shows this firearm was in fact loaded.

If a person is engaged in a robbery and displays or points a gun to assure his demand or back up his demand, the jury is permitted to infer from such acts that the gun was loaded and capable of inflicting the deadly injury threatened by the one who employed it.

Stated in another way, if the jury should find beyond a reasonable doubt from the evidence in the case that the accused did willfully commit robbery of the bank as charged, then the jury must proceed to determine whether the evidence in the case establishes that the accused in commiting the robbery of the bank assaulted or put in jeopardy the lives of the said bank employees, as well as the lives of other persons present as charged in the indictment.

Any willful attempt or threat to inflict injury upon the person of another when coupled with an apparent present ability to do so, or any intentional

display of force such as would give the victim reason to fear or expect immediate bodily harm constitutes an assault.

An assault may be committed without actually touching or striking or doing bodily harm to the person of another. So a person who has the apparent present ability to inflict bodily harm or injury upon another person and willfully attempts or even threatens to inflict such bodily harm as by intentionally flourishing or pointing a pistol or gun at another person may be found to have assaulted such person.

A dangerous weapon or device includes anything capable of being readily operated, manipulated, wielded or otherwise used by one or more persons to inflict severe bodily harm or injury upon another person. So an operable firearm, such as a pistol, revolver or other gun capable of firing a bullet or other ammunition, may be found to be a dangerous weapon or device.

To put in jeopardy the life of a person by the use of a dangerous weapon or device means then to expose such person to a risk of death or to the fear of death by the use of such dangerous weapon or device.

Any variance between the allegations of the indictment and the evidence in the case as to the size and type of any firearm or gun which may have been involved in the commission of the alleged offense is immaterial.

Now, as I indicated to you, and I think in the course of one of the summations, the greater of the two offenses is charged in Count 2 of the indictment and the lesser of the two offenses is charged in Count 1.

The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment whenever such a course is consistent with the facts found by the jury from the evidence in the case. And with the law given in the instructions of the Court.

So, if the jury should ultimately find the accused not guilty of the crime charged in Count 2 of the indictment, then the jury must proceed to determine whether the guilt or innocence of the accused as to any lesser offense, such as contained in Count 1, which is necessarily included in the crime charged in Count 2.

The crime of robbery of a bank accompanied by an assault or the putting in jeopardy of the life of

another by the use of a dangerous weapon or device as charged in Count 2 of the indictment necessarily includes the lesser offense of robbery of a bank, such as is charged in Count 1, without an assault or the putting in jeopardy the life of another by the use of a dangerous weapon or device.

With respect to the offense charged in Count 2 of the indictment, then, if the jury should find the accused not guilty as charged, the jury must then proceed to determine whether the accused is guilty or not guilty of the lesser included offense of robbery of a bank, under Count 1, without even commiting an assault or putting in jeopardy the life of another by the use of a dangerous weapon or device.

Now, going back to the question of aiding and abetting. As I have indicated to you, Section 2 provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. And whoever willfully causes an act to be done, which if directly performed by him or another, would be an offense against the United States, is punishable as a principal.

What this means, is the following: The guilt

of a defendant may be established without proof that the accused personally did every act constituting the offense charged.

In other words, every person who willfully participates in the commission of a crime may be found guilty of that offense. Participation is willful if done voluntarily and intentionally and with a specific intent to do something the law forbids or with a specific intent to fail to do something the law requires to be done.

That is to say, with bad purpose either to disobey or to disregard the law. In order to aid and abet another to commit a crime, it is necessary that the accused willfully associate himself in some way with the criminal venture. And willfully participate in it as he would in something he wishes to bring about.

That is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed. An act or omission is willfully done if done voluntarily and intentionally and with the specific intent to do something the law forbids. Or with the specific intent to fail to do something the law requires to be done. That is to say, with bad purpose, either

reason. An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids. That is to say, with bad purpose, either to disobey or to disregard the law.

Now, knowledge, willfulness and intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a defendant's knowledge and intent from the surrounding circumstances. You may consider any statement made and done or omitted by a defendant and all other facts and circumstances in evidence which indicate his state of mind.

It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

Statements and arguments of counsel are not evidence in the case unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as proved.

In this case, the attorneys stipulated that the bank -- deposits at the Chemical Bank were insured by the Federal Deposits Insurance Corporation. You must

to disobey or to disregard the law.

You, of course may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions, was committed by some person or persons and that the defendant participated in its commission.

Mere presence and knowledge that a crime is being committed are not sufficient to establish that a defendant aided and abetted a crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

To determine whether a defendant aided and abetted the commission of an offense, you ask yourselves these questions: Did he associate himself with the venture? Did he participate in it as something he wished to bring about? Did he seek by his actions to make it succeed?

If he did, then he is an aider and abettor. An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or any other innocent reason.

The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake or accident or other innocent

take that fact as evidence and regard that fact as proved. Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them and all exhibits received in evidence, regardless of who may have produced them and all facts which may have been admitted or stipulated and all applicable presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the Court and any evidence ordered stricken by the Court, must be entirely disregarded. Evidence does include, however, that which is brought out from the witnesses on cross-examination as well as what is testified to on direct examination.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. You are to consider only the evidence in the case and your verdict is to be based on the evidence only.

But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw from facts which you find have been

proved such reasonable inferences as you feel are justified in the light of experience and common sense.

Inferences are deductions and conclusions which reason and common sense lead the jury to draw from the facts which have been established by the evidence in the case. If a lawyer asks a witness a question which has been established by the evidence in the case.

If a lawyer asks a witness a question which contains an assertion of fact, you may not consider the assertion as evidence of that fact. The lawyers' statements as I have so often said are not evidence. Evidence relating to any statement or act or omission claimed to have been made or done by a defendant outside of court and after a crime has been committed, should always be considered with caution and weighed with great care.

All such evidence should be disregarded entirely unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done. A statement or act or omission is knowingly made or done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

In determining whether any statement or act

or omission claimed to have been made by a defendant outside of court and after a crime has been committed was knowingly made or done, the jury should consider the age, sex, training, education, occupation and physical and mental condition of the defendant, And his treatment while in custody or under interrogation as shown by the evidence in the case, And also all other circumstances in evidence surrounding the making of the statement or act or omission, Including whether before the statement or act or omission was made or done the defendant knew or had been told and understood that he was not obligated or required to make or do the statement or act or omission claimed to have been made or done by him; that any statement or act or omission which he might make or do could be used against him in court; that he was entitled to the assistance of counsel before making any statement, either oral or in writing; that before doing any act or omission and that if he was without monies or monies to retain counsel of his own choice an attorney would be appointed to advise him free of cost and obligation.

If the evidence in the case does not convince you beyond a reasonable doubt that an admission was made

voluntarily and intentionally, you should disregard it entirely. On the other hand, if the evidence in the case shows beyond a reasonable doubt that an admission was in fact voluntarily and intentionally made by a defendant, you may consider it as evidence in the case against the defendant who voluntarily and intentionally made the admission.

Admissions of a defendant are among the most effectual proofs of the law and constitute strong evidence against a party making them that can be given of the facts stated in the admissions.

Accordingly you are entitled to give great weight to any defendant's admissions in this case as against the defendant making such admissions. An admission or incriminatory statement or act done by one defendant outside of court may not be considered as evidence against another defendant who is not present and who did not see the act or hear this statement made.

The flight of a defendant immediately after it is discovered that a crime has been committed, if you find beyond a reasonable doubt such to have occurred in this case, is a fact which if proved, may tend to prove consciousness of guilt on the part of the

defendant and may be considered and weighed by the jury in connection with all the other evidence. Whether or not the evidence of flight shows a consciousness of guilt and the significance, if any, to be attached to such circumstance are matters that are for your determination.

Flight of a defendant does not create a presumption of guilt but it is merely a fact to be considered by you together with all the other evidence in determining the guilt or innocence of the defendant.

In your consideration of the alleged evidence of flight, if any, you should consider there may be reasons for this which are fully consistent with innocence. These may include fear of being apprehended, unwillingness to confront the authorities or reluctance to appear as a witness.

Conduct of a defendant including statements knowingly made and acts knowingly done upon being informed that a crime has been committed or being confronted with a criminal charge may be considered by the jury in the light of all the other evidence in the case in determining guilt or innocence.

When a defendant voluntarily and intentionally offers an explanation or makes some statement tending

to show his innocence and this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt.

Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence. Whether or not evidence as to a defendant's voluntary explanation points to a consciousness of guilt and the significance of guilt and the significance to be attached to any such evidence are matters exclusively within the province of the jury.

A statement or an act is knowingly made or done, if made or done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The jury will also bear in mind that the law never imposes upon the defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony

given, the circumstances under which each witness has testified and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of these matters.

Consider also any relation each witness may bear to either side of the case. The manner in which each witness might be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently and innocent misrecollection, like failure of recollection is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail. And whether the discrepancy

results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves. The fact that a witness comes before you as a police officer should not in the least change the applications of these rules. His testimony does not deserve either greater or less believability because of his official status.

Whether you do or do not believe any witness must depend on how truthful you judge that witness to be after you have heard the testimony and formed your own conclusions as to the witness's believability. The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony.

The earlier contradictory statements are admissible to impeach the credibility of the witness and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars

and you may reject all of the testimony of that witness or give it such credibility as you may think it deserves.

The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony. That is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify but is merely a circumstance which you may consider in determining the credibility of the witness.

It is the province of the jury to determine the weight to be given to any prior conviction as impeachment. Evidence of a defendant's previous conviction of a felony is to be considered by the jury only insofar as it may affect the credibility of the defendant as a witness and must never be considered as evidence of guilt of the crime for which the defendant is on trial.

A defendant who wishes to testimy is a competent witness and the defendant's testimony is to be judged in the same way as that of any other witness. The law does not compel a defendant in a criminal case to take the witness stand and testify and no presumption of guilt may be raised and no inference ofany kind may be drawn from the failure of a defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, it is the duty of the attorney on each side of a case to object when the other side offered testimony or other evidence which the attorney believes is not properly admissible.

You should not show prejudice against an attorney or his client because the attorney has made objections. Upon allowing testimony or other evidence to be used over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence.

As stated before, you are the sole judges of the credibility of all witnesses and the weight and effect of all evidence. When the Court has sustained an objection to a question addressed to a witness, the jury must disregard the question entirely and draw no inference from the wording of it or speculate as to what the witness would have said if he had been permitted to answer any question.

The fact that the Court has asked one or more questions of a witness for clarification or admissibility of evidence purposes is not to be taken by you in any

way as indicating that the Court has any opinion as to the guilt or innocence of the accused in this case. And you are to draw no such inference therefrom.

That determination is up to you and you alone based on all the facts in the case and the applicable law in these instructions. You are here to determine the guilt or innocence of the two defendants from the evidence in the case.

You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons are guilty. But if any reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, it is your duty to find the accused not guilty.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment.

Each of you must decide the case for himself and herself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honestconviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember, at all times, you are not partisans. You are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in the case. There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them.

You are expected to use your good common sense. Consider the evidence in the case for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If the accused be proved guilty beyond a

reasonable doubt, say so. If not so proved guilty, say so. You must render a verdict with respect to each of the two defendants separately and you must render a verdict with respect to each of the two counts of the indictment.

If any reference by the Court or counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

The punishment provided for by law for the offense charged in the indictment is a matter exclusively within the province of the Court and should never be considered by the jury in any way in arriving at an impartial verdict, as to the guilt or innocence of the accused.

I am going to backtrack here for just one moment. I think I left out one instruction that I have instructed you on but I want to make sure I include it in these instructions. I was reminded of it when I read to you that you are expected to use your good common sense and consider the evidence in the case for only those purposes for which it has been admitted.

You will recall that during the course of the

trial, a statement that was taken from the defendant Acevedo was admitted into evidence and a statement that was taken from the defendant Marioni was admitted into evidence and I instructed you at that time and I instruct you again at this time that such statements are not admissible against their co-defendants and you are to take them for the limited purpose and consider them only as against the person who made them and I wanted to make sure that that was clear in your minds.

Upon retiring to the jury room, Juror Number One will act as your Foreman, unless, as he has heretofore indicated, he may choose not to do so. If he chooses not to do so, you should elect a Foreman from among your number, or Forelady from among your number. One or the other. The Foreman will preside over your deliberations and will be your spokesman here in court.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by a Deputy Marshal, signed by your Foreman or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing and the Court will never communicate with any member of the jury, on any subject touching the merits of the case,

otherwise than in writing or orally here in open court. You will note from the oath which will be taken shortly by the Deputy Marshals that they, too, as well as all other persons are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Now, bear this in mind, because this is most important. Bear in mind also that you are never to reveal to any person, not even to this Court -- that means anybody connected with the court, including me -- how the jury stands, numerically or otherwise, on the question of guilt or innocence of the accused, until after you have reached a unanimous verdict.

When, as and if you reach a unanimous verdict, you send me a note in which you state, "We have reached a unanimous verdict." You do not tell me what the verdict is and you never, never send me a note saying, "We stand ten to two for this or nine to three for this," or anything of that nature.

If you do, I must declare a mistrial and retry the whole case over before another jury. So do not do it. One jury did and that is what we had to do.

You may be excused now for five minutes, while I discuss matters with the attorneys. In that five

minutes do not discuss the case. I will recall you. There may be one or two additional instruction I have to give you and then at that point I will discharge the alternates and after that you may consider the case. But in this five minute recess do not discuss the case.

(The following occurred in the absence of the jury.)

THE COURT: Wait a minute. Ladies first.

MRS. SCHWARTZ: Your Honor, I don't recall if you -- I know that you charged about testimony of the witnesses and credibility but I don't recall specifically if you gave request Number Three on the defendants' testimony. Perhaps you gave it and I didn't hear it.

THE COURT: No, I didn't. That's what happened. I was going to give that and the -- which was to be followed by that supplemental instruction that I gave. I don't know how I missed it but I did. I had it marked to give it and I neglected to give it. I neglected to give that and I had coupled at one point with the -- with the admissions of a defendant not being given one against the other and I worried about whether I had given that.

MR. PASSALACQUA: Yes. You covered that point twice.

THE COURT: Twice, I think.

MR. PASSALACQUA: Yes. Yes. No question about that, Judge.

MR. FLAMHAFT: I was just informing Cheryl that I gave you a copy this morning, of the charge.

THE COURT: Yes. I think here is a more accurate of law on the question. I'm just a little bit worried about giving it as supplemental instruction, I had given it as part of the main body of the instructions, I think it would have less of an impact than if I gave it now. I am afraid that if I gave it now, I would take it out of the -- I will do this: Have you seen Mr. Flamhaft's request?

MRS. SCHWARTZ: No, I haven't, your Honor.

THE COURT: I will give Mr. Flamhaft's request followed by your request. To balance off against the other.

MRS. SCHWARTZ: May I have a copy of it?

MR. FLAMHAFT: I just have the one copy.

THE COURT: Here. I'll give part of his request, I won't give that part of which I've already given. Or I'll ignore the whole subject altogether.

MR. FLAMHAFT: If you're asking me, your Honor, I would ask that it not be given at all at this point. It would only highlight --

THE COURT: I'm asking Mrs. Schwartz. I'd rather figured that would be your reaction.

MR. FLAMHAFT: Your Honor, may I compliment you on what I consider a very fine, intelligent and fair charge to this jury.

MR. PASSALACQUA: I'll have to join in that, Judge.

THE COURT: You don't have to, Mr. Passalacqua.

MRS. SCHWARTZ: Your Honor, I will request that you give both the charge -- the interested witness submitted by Mr. Flamhaft and the Government's request and I think that that will balance off the two.

MR. PASSALACQUA: Do you want to withdraw yourself?

MR. FLAMHAFT: My suggestion would be not to have a supplemental instruction on interested witness as it would highlight the subject matter before the jury.

MR. PASSALACQUA: If Mrs. Schwartz refuses to do what you suggest, you still want to withdraw yourself?

MR. FLAMHART: I would like to have the supplemental charge made to the jury.

MR. PASSALACQUA: Your supplemental?

MR. FLAMHAFT: Any supplemental

THE COURT: I am a little bit concerned, Mrs. Schwartz. I think if we did, even with the balance, we might -- may I see that again? We might run the risk of -- let me take a look at this.

Well, I don't know, Mr. Flamhaft. I think it would be fair. Your charge is a broad -- your request which I didn't give is a broad request and it asks that the -- and really minimizes the question, as far as the defendant is concerned. I will even modify it slightly. I will say obviously the defendant himself has an interest in the outcome of the case. Whether other -- it doesn't have any others. I will say simply, you must evaluate and determine whether any of the Government's witnesses were motivated by -- I will modify it and then I will give the Government's requests. I think it is a reasonable balance.

MR. FLAMHAFT: Your Honor, --

THE COURT: It is something that I indicated I would do. I would grant the Government's request. You submitted this in contra. I think if I did one as

against the others, I think that is a balance.

MRS. SCHWARTZ: I'd agree with that and I'd also say if your Honor is worried that that might emphasize these particular charges too much, perhaps you might give a cautionary instruction to the jurors.

THE COURT: I will. I will say I omitted a portion of my charge inadvertently and this should not be given any extra weight.

MR. FLAMHAFT: With regard to your instruction, your Honor, I had made an objection the other day when I received Mrs. Schwartz's request and that would be to the word "deep".

THE COURT: I took it out.

MR. FLAMHAFT: You did take it out.

THE COURT: Yes.

MR. FLAMHAFT: I just wanted to make sure.

THE COURT: Okay.

MR. FLAMHAFT: I would have no exceptions. I do have some requests, your Honor, if your Honor would hear me.

THE COURT: Yes.

MR. FLAMHAFT: On the question of reasonable doubt, your Honor, I would most respectfully request the Court, as part of the charge of reasonable doubt,

to ask this jury to consider that reasonable doubt may be based on the evidence or lack of evidence.

THE COURT: All right. I think that is fair enough.

MR. FLAMHAFT: And, your Honor, along the same subject matter, and I think it is indicated by the facts in this case and I'm going to ask that your Honor consider this quite seriously as I know you do all requests but specifically this request; that acts which are just as consistent with innocence as with guilt must be resolved with an innocent construction in the defendant's favor. You touched on it at one part but I think --

THE COURT: No. I will not amplify that. That portion of my charge is very carefully considered and I worked on it over the last year and a half and I think it is the proper and fairest charge that I could come up with for both sides and I don't want to mess with it. I am willing to say a reasonable doubt may be based on lack of evidence as well as positive evidence. I think in this case it may merit it but -- which I would not normally do.

MR. FLAMHAFT: I won't belabor the point, your Honor. However, I do feel in this type of case, where

the -- this jury must decide based on the actions of my client -- that that would be an appropriate charge.

THE COURT: They are not oblivious to anything I said or to their duties, I'm sure.

MR. FLAMHAFT: Thank you for hearing me, your Honor.

THE COURT: Okay. Let's bring them back in.

(Jury present)

THE COURT: Now, ladies and gentlemen, in the interim as I indicated, I discussed my instructions to you with the attorneys. As a result of these discussions and various requests made by them, I am going to give you certain supplemental instructions. Bear in mind what I said right at the outset of the charge that you are to consider the instructions as a whole and not to single out one instruction as stating the law. This applies equally to these supplemental instructions.

You are not to give any greater weight to what I now say than to what I have said in the course of the last hour approximately, three quarters of an hour. You are to consider these along with all the others and give them the exact same weight of the other instructions.

The fact that I give them to you supplementary

don't give them any greater weight. On the question of reasonable doubt, a reasonable doubt may be based on lack of evidence as well as positive evidence. On the question of interested witnesses, if any, if you find any to be such, you have heard mention made that one or another of the witnesses is an interested witness or a disinterested witness and on the basis of such characterization, counsel have asked you to give lesser or greater weight to such witness's testimony.

What makes a witness interested or disinterested is different in a criminal trial than in a civil case. Where the measure of interest, at least in part, is found in how much he may lose or gain in dollars and cents from one verdict or another.

Obviously, the defendant himself has an interest in the outcome of the case. Similarly, you must evaluate and determine whether any of the People's witnesses were motivated by any interest they may have in the coutcome of this case.

The Circuit Court of Appeals in this Circuit has stated that the whole subject of the witness's interest and its effect upon his or her testimony is for you, the jury, to decide. Whether any one witness, through interest or otherwise is entitled to greater

or lesser belief is for you to decide and it is not my place or right to tell you whether any particular witness is, as a matter of law, interested or disinterested. But even should you determine that a witness is interested, that need not mean that he or she has not told the truth.

You must decide from the way he or she acted on the stand, how he or she measured up in your own experience in judging people in everyday affairs. Whether his or her interest is likely unintentionally or otherwise to color his or her testimony.

You are at liberty, if you so decide, even though the witness is not otherwise impeached or contradicted, to disbelieve his or her testimony or to believe some of it or reject other parts or to believe every bit of it.

In no respect, however, are you required to, or compelled to do any of these things unless your own careful consideration and judgment dictates to you that you do so.

As indicated to you, the law permits a defendant at his own request to testify in his own behalf. The testimony of an individual defendant is before you. You must determine how far it is credible.

The personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony and that the greater the interest, the stronger is the temptation. And that the interest of a defendant is of a character possessed by no other witness and is therefore a matter which may seriously affect the credence which should be given to his testimony.

With those additional instructions and with the caution again that you are to take these instructions as part of the instructions as the whole and not to give any undue weight to the fact that they were added supplementary to the original instructions, that concludes the instructions of the Court.

Now, alternate jurors, I trust that they allowed you to order lunch along with the other jurors, did they not? You may not eat your lunch when it arrives with the other jurors, but you may eat your lunch in the witness room, in my witness room, which is right out that door and across the hall. And then when you have completed your lunch, you should go downstairs and report to the Jury Clerk downstairs and I think

46 that will finish your jury service for the day. Whether it finishes your total jury service, I don't know. You should check out.

You are discharged with the thanks of the Court for your conscientious attention to the facts in the case and with the thanks of the community for your service. Unfortunately, you may not serve any further. You may pick up your cards now from the Deputy Clerk.

(Alternates excused.)

THE COURT: All right. Now, would you swear in the Marshals?

(Two male Marshals sworn by the Clerk of the Court.)

THE COURT: All right. Now, ladies and gentlemen, when the Marshals get finished with their other matters here --

Are you ready, Marshals?

THE MARSHALS: Yes, we are ready.

THE COURT: All right. Now you may discuss the case.

(The jury began their deliberations at 1:10 p.m. and th following occurred in their absence.)

THE COURT: All right. I suggest that you all should go to lunch now and be back at -- close to

P. Grant